

UNITED STATES DISTRICT COURT
DISTRICT OF NEVADA

10 UNITED STATES OF AMERICA,)	3:13-cr-00011-HDM-WGC
)	
11 Plaintiff,)	
)	ORDER
12 vs.)	
)	
13 BYRON TRENT DAVIS,)	
)	
14 Defendant.)	
)	

16 Before the court is defendant's application for an order
 17 certifying an interlocutory appeal pursuant to 28 USA § 1292(b) or
 18 a stay of proceedings to allow defendant to present a petition to
 19 the Ninth Circuit Court of Appeals for mandamus relief, filed May
 20 1, 2015.

21 **History**

22 Defendant filed a motion pursuant to 28 U.S.C. § 2255 to
 23 vacate, set aside, or correct sentence by a person in federal
 24 custody in the above-captioned case. (#45). The government
 25 requested the court enter an order waiving defendant's attorney-
 26 client privilege with respect to Mary Boetsch, Esq., as defendant
 27 alleges that his trial attorney provided ineffective assistance of
 28 counsel "[d]ue to deception, fraud, and other bad acts and

1 omissions" which caused defendant to "unknowingly, unintentionally,
2 and involuntarily" enter into a plea agreement with the government
3 and enter a guilty plea. #45 at 4.

4 On January 20, 2015, the court granted the government's
5 application for an order deeming the attorney-client privilege
6 waived and ordered:

7 The attorney-client privilege between defendant and
8 former counsel Mary Boetsch is waived for the purposes of
9 proceeding as to all contentions raised in defendant's
10 motion. Ms. Boetsch shall provide the government with an
11 affidavit or declaration, as well as any relevant
12 materials and information, addressing the allegations and
13 matters raised in defendant's motion on or before
14 February 20, 2015.

12 On February 25, 2015, after receiving an untimely opposition
13 from the defendant, the court reaffirmed its order, noting that it
14 "granted waiver of the privilege only as necessary to address the
15 contentions of defendant's petition" and thus the waiver was
16 "sufficiently narrowly drawn." (Ord. Dated Feb. 25, 2015).

17 On March 19, 2015, defendant filed a motion to reconsider and
18 vacate the order of February 25, 2015. In denying that motion on
19 April 10, 2015, the court clarified its orders of January 20, 2015,
20 and February 25, 2015, to limit their scope to the filing of an
21 affidavit by defendant's former counsel Mary Boetsch.¹ Defendant
22 now seeks certification of an interlocutory appeal pursuant to
23 28 U.S.C. § 1292(b), or, in the alternative, a stay of the
24 proceedings to give him time to petition the court of appeals for a
25 writ of mandamus.

26
27
28 ¹ In effect, the court struck the "as well as any relevant materials"
portion of the January 20, 2015, order.

1 **Legal Standard**

2 28 U.S.C. § 1292(b) states, in relevant part,

3 When a district judge, in making in a civil action
4 an order not otherwise appealable under this section,
5 shall be of the opinion that such an order involves a
6 controlling question of law as to which there is
7 substantial ground for difference of opinion and that an
8 immediate appeal from the order may materially advance
9 the ultimate termination of the litigation, he shall so
10 state in writing in such order.

11 There are therefore three preconditions for 1292(b) review -
12 the order must involve a controlling question of the law; there
13 must be substantial ground for difference of opinion; and it must
14 be true that an immediate appeal from the order may materially
15 advance the ultimate termination of the litigation.

16 **Analysis**

17 Defendant asserts the court's orders concerning the waiver of
18 his attorney-client privilege with former counsel Mary Boetsch
19 involve a controlling question of law. He contends discovery of
20 information protected by the attorney-client privilege is limited
21 by 28 USC § 2255, Rule 6, and that the court erred in approving
22 waiver of the privilege.

23 Rule 6 states a party requesting discovery must provide
24 reasons for the request. See 28 USC § 2255, Rule 6(b). The
25 government's motion (#57) identified defendant's ineffective
26 assistance of counsel claims as the reason it needed to obtain
27 information from former counsel Mary Boetsch and specifically
28 sought from former counsel Mary Boetsch an affidavit or
29 declaration.

30 Defendant's application fails as he has not demonstrated a
31 substantial ground for difference of opinion or that an immediate

1 appeal from the order may materially advance the ultimate
2 termination of the litigation.

3 "It has long been the rule in the federal courts that, where a
4 habeas petitioner raises a claim of ineffective assistance of
5 counsel, he waives the attorney-client privilege as to all
6 communications with his allegedly ineffective lawyer." *Bittaker v.*
7 *Woodford*, 331 F.3d 715, 716 (9th Cir. 2003) (citing *Wharton v.*
8 *Calderon*, 127 F.3d 1201, 1203 (9th Cir. 1997); *Tasby v. United*
9 *States*, 504 F.2d 332, 336 (8th Cir. 1974); *Laughner v. United*
10 *States*, 373 F.2d 326, 327 (5th Cir. 1967)).

11 That defendant has waived his attorney-client privilege is
12 axiomatic. There is no viable dispute under 28 USC § 2255, Rule 6,
13 over the presence of a waiver following a claim of ineffective
14 assistance of counsel. Consequently, defendant has not demonstrated
15 his application involves a controlling question of the law for
16 which there is a substantial ground for difference of opinion.

17 Additionally, defendant has not demonstrated that an immediate
18 appeal from the order may materially advance the ultimate
19 termination of the litigation. An interlocutory appeal pursuant to
20 28 USA § 1292(b) is not intended as merely a routine means for a
21 party to seek review of an order not otherwise appealable. By
22 raising a claim of ineffective assistance of counsel, defendant has
23 opened the door to otherwise privileged information. The current
24 application will not materially advance the ultimate termination of
25 litigation, but rather protract litigation unnecessarily.

26 Defendant protests the scope of the waiver and cites lines of
27 the affidavit he believes are irrelevant and should not be
28 included. See #71 at 5. An application for an order certifying an

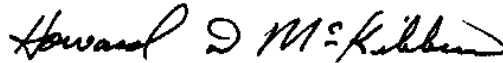
1 interlocutory appeal based upon defendant's protest is unwarranted
2 under the clear language of the statute. If defendant can
3 demonstrate the lines extend beyond the scope of his § 2255
4 petition, however, he has recourse.² The court's orders limited the
5 affidavit to only such information as is necessary to address the
6 contentions of defendant's petition.

7 **Conclusion**

8 Accordingly, and based on the foregoing, defendant's
9 application for an order certifying an interlocutory appeal
10 pursuant to 28 USA § 1292(b) or a stay of proceedings to allow
11 defendant to present a petition to the Ninth Circuit Court of
12 Appeals for mandamus relief is **DENIED**.

13 IT IS SO ORDERED.

14 DATED: This 11th day of May, 2015.

15 

16 UNITED STATES DISTRICT JUDGE
17
18
19
20
21
22
23
24
25

26 ² Indeed, if defendant believes certain lines of the
27 affidavit present information outside the scope of
28 responding to matters present in defendant's § 2255 motion,
he is permitted to file a motion to strike the offending
sections under FRCP 12(f).